

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JAMES VAUGHN,

Petitioner,

vs.

BRIAN WILLIAMS, et al.,

Respondents.

Case No. 2:08-CV-01235-KJD-(PAL)

ORDER

Before the court are the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#7) and respondents' answer (#38). The court finds that relief is not warranted, and the court denies the petition (#7).

In the Eighth Judicial District Court of the State of Nevada, petitioner and his co-defendant Ignacio Dealba were charged with conspiracy to commit robbery, robbery with the use of a deadly weapon, and attempted murder with the use of a deadly weapon.¹ Ex. 10 (#19). The jury found petitioner guilty of robbery with the use of a deadly weapon, and the jury found petitioner not guilty of the other charges. Ex. 29 (#19). The prosecution then notified petitioner that it intended to seek an adjudication of habitual criminality. Ex. 30 (#20). The trial court decided to adjudicate petitioner as a habitual criminal. The trial court sentenced petitioner to a minimum term of five years and a maximum term of twenty years for being a habitual criminal pursuant to Nev. Rev. Stat. § 207.010(1)(a), and the trial court imposed an equal and consecutive sentence for the use of a

¹Dealba also was charged with possession of a firearm by an ex-felon. The criminal proceedings against Dealba are not otherwise relevant to this action.

1 deadly weapon pursuant to the version of Nev. Rev. Stat. § 193.165 that was in effect at the time.
 2 Ex. 37 (#20). This sentence was illegal, because a trial court may impose a sentence enhancement
 3 for habitual criminality or for use of a deadly weapon, but a trial court may not impose both
 4 enhancements simultaneously. Odoms v. State, 714 P.2d 568, 572 (Nev. 1986). Petitioner himself
 5 was the first person to recognize the problem and to bring it to the court's attention at the sentencing
 6 hearing. Ex. 35, pp. 15-16 (#20). After an agreement by the parties, the trial court re-sentenced
 7 petitioner to a minimum term of five years and a maximum term of twenty years for being a habitual
 8 criminal. Ex. 52 (#20). Petitioner appealed, and the Nevada Supreme Court affirmed. Ex. 65
 9 (#21).

10 Petitioner returned to the state district court. He filed a post-conviction habeas corpus
 11 petition. Ex. 76 (#21). He also filed a motion to correct an illegal sentence. Ex. 96 (#22). The
 12 district court denied both, and the Nevada Supreme Court affirmed in a consolidated order. Ex. 112
 13 (#22). Petitioner also filed a motion for a new trial. Ex. 93 (#22). The district court denied this
 14 motion, and the Nevada Supreme Court affirmed. Ex. 116 (#22).

15 Petitioner then commenced this action. The court dismissed part of ground 5 as procedurally
 16 defaulted, and the court dismissed ground 8 because it was simply a placeholder with no allegations
 17 of fact or claims that petitioner's custody violated the Constitution or the laws of the United States.
 18 Order (#30). Reasonable jurists would not find these conclusions to be debatable or wrong, and the
 19 court will not issue a certificate of appealability on these grounds.

20 "A federal court may grant a state habeas petitioner relief for a claim that was adjudicated on
 21 the merits in state court only if that adjudication 'resulted in a decision that was contrary to, or
 22 involved an unreasonable application of, clearly established Federal law, as determined by the
 23 Supreme Court of the United States,'" Mitchell v. Esparza, 540 U.S. 12, 15 (2003) (quoting 28
 24 U.S.C. § 2254(d)(1)), or if the state-court adjudication "resulted in a decision that was based on an
 25 unreasonable determination of the facts in light of the evidence presented in the State court
 26 proceeding," 28 U.S.C. § 2254(d)(2).

27 A state court's decision is "contrary to" our clearly established law if it "applies a rule that
 28 contradicts the governing law set forth in our cases" or if it "confronts a set of facts that are
 materially indistinguishable from a decision of this Court and nevertheless arrives at a result

1 different from our precedent.” A state court’s decision is not “contrary to . . . clearly
2 established Federal law” simply because the court did not cite our opinions. We have held
3 that a state court need not even be aware of our precedents, “so long as neither the reasoning
nor the result of the state-court decision contradicts them.”

4 Id. at 15-16. “Under § 2254(d)(1)’s ‘unreasonable application’ clause . . . a federal habeas court
5 may not issue the writ simply because that court concludes in its independent judgment that the
6 relevant state-court decision applied clearly established federal law erroneously or incorrectly.
7 Rather, that application must be objectively unreasonable.” Lockyer v. Andrade, 538 U.S. 63, 75-76
8 (2003) (internal quotations omitted).

9 [T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If
10 a legal rule is specific, the range may be narrow. Applications of the rule may be plainly
11 correct or incorrect. Other rules are more general, and their meaning must emerge in
12 application over the course of time. Applying a general standard to a specific case can
demand a substantial element of judgment. As a result, evaluating whether a rule
application was unreasonable requires considering the rule’s specificity. The more general
the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.

13 Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

14 The petitioner bears the burden of proving by a preponderance of the evidence that he is
15 entitled to habeas relief. Davis v. Woodford, 384 F.3d 628, 638 (9th Cir. 2004).

16 The facts of this case are largely undisputed. On June 7, 2005, Timothy Shalhoob, an off-
17 duty sergeant of the Las Vegas Metropolitan Police Department, had just picked up food from a
18 McDonald’s drive through. He saw two women walk in front of his truck, heard a scream, and
19 turned his head to see one of the women struggling with an assailant, whom Shalhoob later
20 identified as Dealba. Dealba took \$1,100 from the woman and ran to a red BMW that was parked
21 nearby. The BMW started to move out of its parking space. Shalhoob retrieved his pistol and
22 moved his truck to block the BMW. The two vehicles came nose-to-nose, and Shalhoob saw the
23 driver, whom Shalhoob later identified as petitioner. Petitioner reversed the BMW back into the
24 parking space. Shalhoob pulled forward to block the BMW, rolled down the window, and identified
25 himself as a police officer. Petitioner evaded the block and drove away. Shalhoob pursued. Dealba
26 reached through the sun roof of the BMW and fired several shots at Shalhoob; all missed. Shalhoob
27 pursued the BMW for some distance and, although he eventually lost the BMW in traffic, he did
28 read the license plate number and gave it to the police dispatcher.

1 The motor vehicle records showed that license plate was issued to a red BMW, registered to
 2 petitioner's mother. The registered address was out of date, but police detectives found her current
 3 address and waited there. A few hours after the robbery, petitioner drove up to the home in the
 4 BMW. Police arrested him and advised him of his rights pursuant to Miranda v. Arizona, 384 U.S.
 5 436 (1966). Petitioner agreed to speak. Even before anybody asked him a question, he stated that
 6 didn't know that Shalhoob was a police officer and that he did not shoot at anybody. Over the
 7 course of three statements, petitioner said that he and Dealba drove to the McDonald's, that he did
 8 not know that Dealba intended to rob someone, but that he realized what Dealba did when Dealba
 9 rushed back to the BMW. Petitioner stated that after he eluded Shalhoob, he drove to Dealba's
 10 apartment, where they had pizza and soda for lunch. Petitioner then left to look for someone
 11 elsewhere in town, and then he returned to his residence, where police arrested him. Petitioner
 12 stated that Dealba gave him \$300 from the proceeds of the robbery for his part in it.² A search of
 13 the vehicle pursuant to a warrant revealed the \$300.

14 Ground 1 is a claim of ineffective assistance of counsel. "[T]he right to counsel is the right
 15 to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970).
 16 A petitioner claiming ineffective assistance of counsel must demonstrate (1) that the defense
 17 attorney's representation "fell below an objective standard of reasonableness," Strickland v.
 18 Washington, 466 U.S. 668, 688 (1984), and (2) that the attorney's deficient performance prejudiced
 19 the defendant such that "there is a reasonable probability that, but for counsel's unprofessional
 20 errors, the result of the proceeding would have been different," id. at 694. "[T]here is no reason for
 21 a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to
 22 address both components of the inquiry if the defendant makes an insufficient showing on one." Id.
 23 at 697.

24 Strickland expressly declines to articulate specific guidelines for attorney performance
 25 beyond generalized duties, including the duty of loyalty, the duty to avoid conflicts of interest, the
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27
 28 ²In his second statement, petitioner said that the money was from a workman's compensation
 claim, but in his third statement he admitted that Dealba gave him the money.

1 duty to advocate the defendant's cause, and the duty to communicate with the client over the course
2 of the prosecution. 466 U.S. at 688. The Court avoided defining defense counsel's duties so
3 exhaustively as to give rise to a "checklist for judicial evaluation of attorney performance. . . . Any
4 such set of rules would interfere with the constitutionally protected independence of counsel and
5 restrict the wide latitude counsel must have in making tactical decisions." Id. at 688-89.

6 Review of an attorney's performance must be "highly deferential," and must adopt counsel's
7 perspective at the time of the challenged conduct to avoid the "distorting effects of hindsight."
8 Strickland, 466 U.S. at 689. A reviewing court must "indulge a strong presumption that counsel's
9 conduct falls within the wide range of reasonable professional assistance; that is, the defendant must
10 overcome the presumption that, under the circumstances, the challenged action 'might be considered
11 sound trial strategy.'" Id. (citation omitted).

12 The Sixth Amendment does not guarantee effective counsel per se, but rather a fair
13 proceeding with a reliable outcome. See Strickland, 466 U.S. at 691-92. See also Jennings v.
14 Woodford, 290 F.3d 1006, 1012 (9th Cir. 2002). Consequently, a demonstration that counsel fell
15 below an objective standard of reasonableness alone is insufficient to warrant a finding of
16 ineffective assistance. The petitioner must also show that the attorney's sub-par performance
17 prejudiced the defense. Strickland, 466 U.S. at 691-92. There must be a reasonable probability that,
18 but for the attorney's challenged conduct, the result of the proceeding in question would have been
19 different. Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence
20 in the outcome." Id.

21 If a state court applies the principles of Strickland to a claim of ineffective assistance of
22 counsel in a proceeding before that court, the petitioner must show that the state court applied
23 Strickland in an objectively unreasonable manner to gain federal habeas corpus relief. Woodford v.
24 Visciotti, 537 U.S. 19, 25 (2002) (per curiam).

25 Two of the claims in ground 1 are that counsel failed to file a motion to suppress and that
26 counsel did not investigate and use the victim's testimony that she did not identify petitioner in a
27 photographic line-up or at the crime scene. On these claims, the Nevada Supreme Court held:
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1 First, appellant claimed that his trial counsel were ineffective for failing to properly
2 represent petitioner. Appellant claimed that trial counsel failed to file a motion to suppress
3 the “gun et. al” [sic] on the basis that the female victim did not identify appellant in a line-up
4 or at the crime scene and did not ever state that appellant had used a gun or was involved in
5 the robbery. Appellant failed to demonstrate that his trial counsel were deficient or that he
6 was prejudiced. First, appellant failed to sufficiently identify the evidence or statements that
7 should have been suppressed. Although appellant indicated that “gun et. al” [sic] should
8 have been suppressed, notably, a gun was never recovered in the instant case. Appellant was
9 read his Miranda rights immediately after being pulled over and exiting the car and failed to
10 demonstrate that any of his statements to the police should have been suppressed. The
11 money recovered from appellant’s vehicle was recovered pursuant to a search based upon a
12 warrant, and appellant failed to demonstrate any defects in the search. Finally, although the
13 female victim did not identify appellant as the driver of the getaway vehicle, the off-duty
14 police officer who witnessed the robbery and engaged in pursuit of appellant positively
15 identified appellant as the driver of the vehicle. Thus, appellant failed to demonstrate that a
16 motion to suppress was meritorious and that there was a reasonable likelihood that excluding
17 evidence would have altered the outcome of the trial. Therefore, we conclude that the
18 district court did not err in denying this claim.

19 Ex. 112, pp. 2-3 (#22) (footnotes omitted). Just as with the state petition, petitioner does not allege
20 in his federal petition what evidence should have been suppressed, other than a gun that never was
21 recovered. Additionally, as the facts of the case show, the police complied with all the rules for
22 collecting evidence. They gave petitioner the warnings required by Miranda, petitioner agreed to
23 speak with them, and they obtained a search warrant before they searched the car. There was
24 nothing for counsel to move to suppress.

25 The lack of identification by the victim of the robbery was irrelevant, because Shalhoob also
26 was present at the robbery and did identify petitioner, and because petitioner did not dispute at trial
27 that he drove the car after the robbery. Petitioner’s defense was mere presence: He had no idea that
28 Dealba intended to commit a robbery, and then he tried to get away after the robbery occurred. See
Ex. 27, pp. 79-89 (#19). The victim’s inability to identify petitioner made no difference to mere-
presence defense. Also, as the Nevada Supreme Court noted, other direct and circumstantial
evidence tied petitioner strongly to the crime. Even if petitioner did not know that Dealba intended
to commit robbery when he drove Dealba to the gas station, he fled from the scene of the robbery
with Dealba, went to Dealba’s apartment, ate a meal with Dealba, and accepted some of the money
that Dealba stole from the victim. Those subsequent actions are circumstantial evidence that
petitioner aided and abetted the robbery, not that petitioner was merely present at the robbery.

1 Furthermore, the record does not support petitioner's argument that counsel did not utilize
2 the testimony of the victim in petitioner's defense. Counsel argued that she was not a reliable
3 witness because her memories of the event were vague and inaccurate. Ex. 27, pp. 81-82 (#19).
4 Although counsel did not note specifically that she could not identify petitioner, counsel did note
5 that she was "not the person who perceived what happened the best." Id., p. 82.

6 Also in ground 1, petitioner claimed that counsel did not investigate information from the
7 police at the crime scene, nor did counsel use an investigator to interview potential witnesses. On
8 this claim, the Nevada Supreme Court held:

9 Second, appellant claimed that his trial counsel were ineffective for failing to perform proper
10 and adequate investigation, interview or subpoena witnesses in order to establish a defense
11 to the charges. Appellant failed to demonstrate that his trial counsel's performance was
12 deficient or that he was prejudiced. "An attorney must make reasonable investigations or a
13 reasonable decision that particular investigations are unnecessary." Appellant failed to
specifically identify the information or witnesses his counsel should have discovered had
trial counsel conducted further investigation into the case. Thus, appellant failed to
demonstrate that there was a reasonable likelihood of a different result. Therefore, we
conclude that the district court did not err in denying this claim.

14 Ex. 112, pp. 3-4 (#22). Similarly, in the federal petition, petitioner does not allege what counsel
15 should have investigated, and thus he failed to demonstrate any prejudice. The Nevada Supreme
16 Court applied Strickland reasonably. 28 U.S.C. § 2254(d)(1).

17 Reasonable jurists would not find these conclusions to be debatable or wrong, and the court
18 will not issue a certificate of appealability on ground 1.

19 Ground 2 is a claim of ineffective assistance of counsel. Petitioner alleges that trial counsel
20 told him that two jurors were confused over the instruction on the use of a deadly weapon. The
21 jurors said that but for that instruction, they would not have found petitioner guilty of the use of a
22 deadly weapon. Petitioner claims that trial counsel failed to mention this to appellate counsel, and
23 that appellate counsel failed to raise the issue on appeal.

24 The record belies petitioner's claim. Appellate counsel did raise the issue of the jury
25 instruction on whether an accomplice can be held liable for the use of a deadly weapon. Ex. 60, pp.
26 9-10 (#21). The Nevada Supreme Court determined that the error was harmless because of
27 petitioner's "active role in the robbery as a getaway driver" Ex. 65, p. 3 (#21). In petitioner's
28 habeas corpus appeal, the Nevada Supreme Court determined that petitioner could not demonstrate

1 prejudice because petitioner ultimately was not penalized for the use of a deadly weapon, because
 2 petitioner was sentenced as a habitual criminal instead. Ex. 112, p. 5 (#22).

3 On this issue, the Nevada Supreme Court held:

4 Third, appellant claimed that trial counsel was ineffective failing [sic] to object to the State's
 5 deadly weapon enhancement jury instruction. Jury Instruction 9 read, "An unarmed aider
 6 and abettor must have knowledge that a weapon was used in the commission of the crime in
 7 order to be held liable for the 'use' of a deadly weapon." Appellant further claimed that trial
 8 counsel learned shortly after trial that two of the jurors expressed confusion regarding this
 9 instruction and would have returned a not guilty verdict had they been provided with a more
 10 accurate jury instruction. Appellant claimed that his trial counsel failed to deliver this
 11 information to his appellate counsel.

12 Appellant failed to demonstrate that his trial counsel's performance was deficient or that he
 13 was prejudiced. Trial counsel proffered the following jury instruction that included language
 14 about constructive possession for the unarmed aider and abettor:

15 An unarmed defendant, charged as an aider or abettor or co-conspirator, cannot be
 16 held criminally responsible for use of a deadly weapon unless he has actual or
 17 constructive control over the deadly weapon. An unarmed defendant does not have
 18 constructive control over a weapon unless the State proves he had knowledge the
 19 armed offender was armed and he had the ability to exercise control over the firearm.

20 The State objected to the jury instruction, and the district court sustained the objection. Trial
 21 counsel then offered the language that was included in jury instruction 9, which the district
 22 court permitted. Appellate counsel argued on direct appeal that the district court had erred in
 23 the armed aider and abettor deadly weapon enhancement jury instruction because the jury
 24 instruction failed to inform the jury that the unarmed aider and abettor had to have the ability
 25 to exercise control over the weapon. This court determined that the jury instruction was
 26 erroneous because it did not include the required element that the unarmed aider and abettor
 27 have the ability to control the weapon in addition to the knowledge element. However, this
 28 court concluded that it was persuaded beyond a reasonable doubt that the verdict would have
 been the same absent the erroneous instruction given the appellant's active role in the
 robbery as a getaway driver. Because this court has already determined that there would not
 have been a different outcome absent the erroneous jury instruction, appellant failed to
 demonstrate that he was prejudiced in the instant case. Additionally, because appellant is
 not serving an enhancement for the use of the deadly weapon, appellant cannot demonstrate
 any prejudice in the instant case. Finally, we note that any juror affidavits or testimony
 regarding their confusion would not have been admissible. Therefore, we conclude that the
 district court did not err in denying this claim.

23 Ex. 112, pp. 4-6 (#22) (emphasis added). Counsel did what petitioner alleges counsel should have
 24 done. The Nevada Supreme Court reasonably applied Strickland, and ground 2 is without merit.

25 Reasonable jurists would not find these conclusions to be debatable or wrong, and the court
 26 will not issue a certificate of appealability on ground 2.

27 Ground 3 contains three claims of ineffective assistance of counsel. First, petitioner argues
 28 that counsel should have requested an instruction to the jury on an alibi. As noted above,

1 petitioner's theory of defense was that he gave Dealba a ride to the store, with no knowledge of
2 Dealba's intent to rob the store or Dealba's possession of a gun. On this issue, the Nevada Supreme
3 Court held:

4 Fourth, appellant claimed that his trial counsel was ineffective for failing to request an alibi
5 jury instruction. Appellant claimed that because he had no knowledge or intent to commit
6 robbery and just gave the codefendant a ride to the store that he had an alibi for the offense.
7 Appellant failed to demonstrate that his trial counsel's performance was deficient or that he
8 was prejudiced. An "alibi" is defined as being "elsewhere . . . in another place" at the time
the crime was committed. Appellant's theory of defense was that he was merely present at
the scene of the crime. Appellant was not entitled to an alibi jury instruction because he did
not present an alibi defense and there was no evidence to support an alibi defense.
Therefore, we conclude that the district court did not err in denying this claim.

9 Ex. 112, p. 6 (#22) (footnotes omitted). This claim is based upon petitioner's misunderstanding of
10 the word "alibi." The Nevada Supreme Court's disposition of the claim was a reasonable
11 application of Strickland.

12 Second, petitioner alleges that the charge of conspiracy was dismissed because of
13 insufficient evidence. He argues that counsel should have argued that the dismissal of the charge to
14 the jury as evidence that there was insufficient evidence that petitioner aided and abetted in the
15 robbery. Petitioner misunderstands what happened at trial. The trial court did not dismiss the
16 counts of conspiracy and attempted murder with the use of a deadly weapon. The jury acquitted
17 petitioner of those charges after counsel argued to them that the prosecution had not met its burden
18 of proof. Ex. 27, pp. 85-88 (#19). In effect, counsel did what petitioner claims that counsel should
19 have done. The jury did not accept all of counsel's argument, because the jury found petitioner
20 guilty of robbery with the use of a deadly weapon, but that does not signify deficient performance.
21 This part of ground 3 is without merit.

22 Third, petitioner claims that counsel did not argue to the jury that the victim did not identify
23 petitioner, let alone see him with a gun. This claim duplicates a similar claim in ground 1, and it is
24 without merit for the same reason.

25 Reasonable jurists would not find these conclusions to be debatable or wrong, and the court
26 will not issue a certificate of appealability on ground 3.

27 In ground 4, petitioner argues that the trial court gave an incorrect instruction on when an
28 aider and abettor can be held liable for the use of a deadly weapon, and petitioner claims that this

1 was due to bias against him. Petitioner raised on direct appeal the issue whether the instruction was
2 incorrect. He did not claim on direct appeal that the trial court rejected the first proposed instruction
3 because of bias. The court agrees with respondents that petitioner has not proven any bias. The
4 prosecutor and defense counsel argued over what the correct instruction was, and the trial judge
5 made her decision. Ex. 26, pp. 56-60 (#13). The Nevada Supreme Court held that the instruction
6 given to the jury was erroneous, but an error in jury instructions is not itself evidence of bias.
7 Nothing in the transcript indicates that the judge held any bias against petitioner.

8 On the issue of whether the instruction was correct, the Nevada Supreme Court held:

9 Second, Vaughn argues that the jury instruction defining the use of a deadly weapon for an
10 unarmed aider and abettor was erroneous. The jury instruction stated that “[a]n unarmed
11 aider and abettor must have knowledge that a weapon was used in the crime in order to be
12 held liable for the ‘use’ of a deadly weapon.” Vaughn argues that the jury instruction failed
to include a necessary element in support of the deadly weapon enhancement—that the jury
find that Vaughn had the ability to exercise control over the firearm. We conclude that the
error is harmless beyond a reasonable doubt.

13 It is well established that an unarmed aider and abettor may be found guilty of using a deadly
14 weapon if the unarmed participant has (1) knowledge that the principal offender is armed,
15 and (2) the ability to exercise control over the deadly weapon. This court has held that the
control requirement of this test is met where the defendant had the ability to verbally deter
the armed codefendant from using the weapon.

16 In this case, the jury instruction was erroneous because it did not include the required
17 element that Vaughn have the ability to control the weapon. However, in light of Vaughn’s
18 active role in the robbery as a getaway driver, we are persuaded beyond a reasonable doubt
that the verdict would have been the same absent the erroneous instruction.

19 Ex. 65, pp. 2-3 (#21) (footnotes omitted). The Nevada Supreme Court correctly identified the
20 governing principle of federal law, “that before a federal constitutional error can be held harmless,
21 the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”
22 Chapman v. California, 386 U.S. 18, 24 (1967).

23 In determining on federal habeas corpus whether an error is harmless, this court does not
24 determine pursuant to 28 U.S.C. § 2254(d)(1) whether the Nevada Supreme Court applied Chapman
25 reasonably. Instead, this court uses a more forgiving standard of harmless-error review. Fry v.
26 Pliler, 551 U.S. 112, 119-20 (2007); Pulido v. Chrones, 629 F.3d 1007, 1012. In federal habeas
27 corpus, an error is harmless unless it “‘had substantial and injurious effect or influence in
28 determining the jury’s verdict.’” Brecht v. Abrahamson, 507 U.S. 619, 631, 638 (1993) (quoting

1 Kotteakos v. United States, 328 U.S. 750, 776 (1946). “Under this standard, habeas petitioners may
2 obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based
3 on trial error unless they can establish that it resulted in ‘actual prejudice.’” Brecht, 507 U.S. at 637.

4 Petitioner did not suffer actual prejudice from the erroneous instruction or from any bias that
5 the district court might have held against petitioner. Not only did the jury find him guilty of using a
6 deadly weapon in the course of the robbery, but also the trial judge determined that he was a
7 habitual criminal. At first, the trial court sentenced petitioner as a habitual criminal, pursuant to
8 Nev. Rev. Stat. § 207.010, and then added an equal and consecutive term for the use of a deadly
9 weapon, pursuant to Nev. Rev. Stat. § 193.165. Ex. 37 (#20). That sentence was erroneous because
10 a trial court may not enhance a sentence for both habitual criminality and for the use of a deadly
11 weapon. Odoms v. State, 714 P.2d 568, 572 (Nev. 1986). After the error was brought to the trial
12 court’s attention, that court then sentenced petitioner as a habitual criminal only. Ex. 52 (#20).
13 Ultimately, petitioner was not sentenced for the use of a deadly weapon. Even if the instruction was
14 erroneous, he did not suffer any actual prejudice, and the error was harmless.

15 Reasonable jurists would not find these conclusions to be debatable or wrong, and the court
16 will not issue a certificate of appealability on ground 4.

17 The court dismissed three claims in ground 5 because they were procedurally defaulted.
18 Order (#30). Two claims of ineffective assistance of counsel remain. First, petitioner argues that
19 trial counsel was ineffective because he was not prepared to challenge the sufficiency of the notice
20 to seek adjudication of Petitioner as a habitual offender. The Nevada Supreme Court held:

21 Sixth, appellant claimed that his trial counsel was ineffective for failing to challenge his
22 habitual criminal adjudication on the ground that he was not provided sufficient notice.
23 Appellant failed to demonstrate that his trial counsel’s performance was deficient or that he
24 was prejudiced. The notice of habitual criminality was filed in the district court on February
13, 2006, well in advance of the sentencing hearing. Therefore, we conclude that the district
court did not err in denying this claim.

25 Ex. 112, p. 7 (#22). The law requires that when the prosecution files a notice of habitual criminality
26 after the jury’s verdict on the primary offense, the sentencing must occur at least fifteen days after
27 the filing of the notice. Nev. Rev. Stat. § 207.016(2). As the Nevada Supreme Court noted, the
28 notice of habitual criminality was filed on February 13, 2006. Ex. 30 (#20). The sentencing hearing

1 occurred on April 6, 2006. Ex. 35 (#20). Petitioner received the notice with sufficient time before
2 sentencing. An objection would have been fruitless. The Nevada Supreme Court reasonably
3 applied Strickland. 28 U.S.C. § 2254(d).

4 Second, petitioner argues that appellate counsel was ineffective because he failed to argue on
5 direct appeal that the district court abused its discretion in adjudicating Petitioner as a habitual
6 offender. Adjudication of a person as a habitual criminal is not automatic upon finding the requisite
7 number of prior convictions; it is a matter of discretion for the trial judge. Hughes v. State, 996
8 P.2d 890 (Nev.2000) (per curiam). The trial judge heard both parties out and gave her reasons why
9 she was adjudicating petitioner as a habitual offender. Ex. 35, p. 14 (#20). Petitioner gives no
10 reasons why the judge abused her discretion, and the court can find none. Petitioner has shown
11 neither deficient performance by counsel nor actual prejudice.

12 Reasonable jurists would not find these conclusions to be debatable or wrong, and the court
13 will not issue a certificate of appealability on ground 5.

14 Ground 6 contains two claims of ineffective assistance of counsel. First, petitioner alleges
15 that the attorney who represented him at trial, Andrea Luem, met him for the first time on the day of
16 the trial. Petitioner claims that she was not prepared for trial because she never spoke with
17 petitioner. On this issue, the Nevada Supreme Court held:

18 Fifth, appellant claimed that his trial counsel were ineffective for failing to consult with him
19 and visit in order to prepare a defense strategy. Appellant failed to demonstrate that he was
20 prejudiced. Appellant failed to indicate how further consultation and visits would have had
a reasonable probability of altering the outcome of the trial. Therefore, we conclude that the
district court did not err in denying this claim.

21 Ex. 112, p. 7 (#22) (footnote omitted). Likewise, in the federal petition (#7), petitioner does not
22 allege how consultation and visits would have altered the outcome of the trial. The only indication
23 in the petition that petitioner wanted to pursue a different defense was in ground 3, and that is based
24 upon petitioner's misunderstanding of the word "alibi." The Nevada Supreme Court reasonably
25 applied Strickland. 28 U.S.C. § 2254(d)(1).

26 Second, Counsel was ineffective for allowing in-court identification of petitioner at the
27 preliminary hearing. On this issue, the Nevada Supreme Court held:

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1 Seventh, appellant claimed that his trial counsel was ineffective for allowing the victim of
2 the robbery identify [sic] him at the preliminary hearing. He claimed that it was unfair as he
3 was the only black man in a county jail uniform at the hearing and he was not identified in a
4 line-up by the robbery victim. Appellant failed to demonstrate that his counsel's
5 performance was deficient or that he was prejudiced. The victim of the robbery did not
6 identify appellant at the preliminary hearing. The off-duty police officer who witnessed the
7 robbery positively identified appellant at the preliminary hearing. The fact that the robbery
victim could not identify appellant in a line-up had no bearing upon whether the witness
could identify appellant. The off-duty police officer testified at trial that he made eye
contact with appellant when he attempted to block appellant's vehicle from leaving the
parking space. Appellant did not demonstrate that his appearance in a county jail uniform
during the preliminary hearing warranted any relief. Therefore, we conclude that the district
court did not err in denying this claim.

8 Ex. 112, pp. 7-8 (#22) (footnote omitted). In addition to the Nevada Supreme Court's reasons, other
9 evidence made a lack of objection on this issue non-prejudicial. First, Shalhoob reported the license
10 plate of the getaway vehicle, and the vehicle was found to be registered to petitioner's mother.
11 Police waited by the known address of petitioner's mother, and they saw petitioner drive up in that
12 same vehicle. Shalhoob went to that location, and he immediately identified petitioner as the driver.
13 Petitioner, after being advised of his rights, admitted that he drove the vehicle during and after the
14 robbery. Furthermore, the jury never was informed that Shalhoob had identified petitioner at the
15 preliminary hearing. The identification of petitioner at the preliminary hearing had no effect upon
16 the jury's finding of guilt. The Nevada Supreme Court reasonably applied Strickland. 28 U.S.C.
17 § 2254(d)(1).

18 Reasonable jurists would not find these conclusions to be debatable or wrong, and the court
19 will not issue a certificate of appealability on ground 6.

20 Ground 7 repeats the claim in ground 1 that counsel should have filed a motion to suppress,
21 Petitioner bases this claim upon Shalhoob's testimony that Dealba, not petitioner, shot at him, and
22 the victim's testimony that petitioner himself never pointed a gun at her. As with ground 1,
23 petitioner does not allege what evidence counsel should have moved to suppress. Ground 7 is
24 without merit for the same reason that ground 1 is without merit. The court will not issue a
25 certificate of appealability for ground 7.

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1 IT IS THEREFORE ORDERED that the petition for a writ of habeas corpus pursuant to 28
2 U.S.C. § 2254 (#7) is **DENIED**. The clerk of the court shall enter judgment accordingly.

3 IT IS FURTHER ORDERED that a certificate of appealability is **DENIED**.

4 DATED: August 11, 2011

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7 KENT J. DAWSON
United States District Judge